(3)

No. 90-970

In the Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the owner of a store in a shopping plaza violated Section 8(a)(1) of the National Labor Relations Act by barring nonemployee union personnel from distributing organizational literature to store employees in the plaza's parking lot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 914 F.2d 313. The Board's decision and order (Pet. App. B1-B29) are reported at 295 N.L.R.B. No. 15.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1990. A petition for rehearing was denied on October 25, 1990. Pet. App. C1. A petition for a writ of certiorari was filed on December 17, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner operates a chain of retail stores, one of which is located in the Lechmere Shopping Plaza in Newington, Connecticut. Newington is part of the Greater Hartford metropolitan area, which has approximately 900,000 residents. Petitioner's Newington store employs about 200 employees. Petitioner owns the property occupied by and immediately surrounding its store, while an unaffiliated enterprise owns the property occupied by the satellite stores. Ownership of the plaza's parking lot and other property is divided nearly equally between the two. Although the parking lot is not marked by signs warning of restrictions on access or use, petitioner has consistently enforced a policy against nonemployee solicitation and distribution activities at the plaza. Pet. App. A2, A26, B3-B5, B10-B13, B19.

The main entrance to the plaza is from the Berlin Turnpike, a four-lane highway with a speed limit of 50 miles per hour. There is no traffic signal or stop sign at the entrance from the turnpike into the plaza. Abutting the turnpike is a 46-foot-wide grassy strip, most of which is public property; the strip is the only public property in the area of the plaza. Pet. App. A18 n.11, B6.

b. Beginning on June 16, 1987, Local 919 of the United Food and Commercial Workers (Union) began a campaign to organize the employees at petitioner's store by placing a series of five advertisements in the *Hartford Courant*, a general circulation newspaper serving the Greater Hartford area. The *Courant* has fewer than 100,000 daily subscribers, and it is unknown how many of petitioner's employees are among them. Petitioner systematically removed the Union's advertisements from papers delivered to its store. Pet. App. A4-A5, B5, B13, B18 & n.6.

On June 18, Union representatives placed handbills on the windshields of cars parked in the portion of the plaza's parking lot where petitioner's employees had been told to park. Shortly after this handbilling began, the store's assistant manager informed the organizers of petitioner's no-solicitation policy and asked them to leave. The organizers left, and petitioner's security guards immediately confiscated the handbills. Union representatives returned to the parking lot twice that day to distribute handbills, but met with the same results. Pet. App. A5, B13-B14.

On June 20, two Union representatives began placing handbills on the windshields of cars parked in the area used by petitioner's employees. Almost immediately, petitioner's store manager asked them to leave. They complied. The Union representatives then attempted to pass out handbills to employees by standing on what they correctly understood to be public property abutting the main entrance to the plaza. Within five minutes, the store manager claimed that the organizers were on petitioner's property, demanded that they leave, and called the police to eject them. Although a policeman told the Union representatives that they had a right to remain on the public portion of the grassy strip, he urged them to take care because distributing literature from the strip was dangerous. Soon after, the Union organizers left. Pet. App. B14-B17, B24-B25.

Meanwhile, the Union secured the names and addresses of 41 employees by recording the license plate numbers from cars believed to belong to petitioner's employees, and then obtaining the names and addresses of the registered owners from the Connecticut Department of Motor Vehicles. The Union sent four mailings of literature to those individuals, made about ten home visits, and attempted to reach another ten employees by phone. Nearly half of the 41 had unlisted numbers, and several were high school students whose parents refused to allow the organizers to speak with them. Pet. App. A6, B5 & n.10, B18-B19.

2. The Union filed charges alleging that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by denying the nonemployee Union organizers access to the parking lot for the purpose of giving handbills to employees, thereby interfering with the employees' rights under Section 7 of the Act, 29 U.S.C. 157.[1] Pet. App. B2. Relying on *Fairmont Hotel Co.*, 282 N.L.R.B. 139 (1986), the administrative law judge found that petitioner's denial of access violated Section 8(a)(1). Pet. App. B22-B23.

Applying a different analysis, the Board affirmed. The Board relied on its recent decision in *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988), in which it declared that "in all access cases" it would balance "the degree of impairment of the Section 7 right if access should be denied * * * against the degree of impairment of the private property right if access should be granted," and that an "especially significant" consideration in this balancing process would be "the availability of reasonably effective alternative means" of communication. Slip op. 9.

The Section 7 interest in this case, the Board stated, is the right of the employees to organize—a right "at the very core" of the Act. It observed that, because the Union's handbilling occurred in a parking lot and did not impede traffic flow or interfere with the lot's normal use, the handbilling did not "disrupt[]" petitioner's business or significantly "inconvenience[]" its customers. Because neither the handbilling's location nor the manner in which it was carried out diminished "the strength of the core Section 7 right

[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. Under Section 7, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

asserted," the Board found that the "Section 7 right is certainly worthy of protection against substantial impairment." Pet. App. B4.

Petitioner's property right, the Board found, was "relatively substantial," but was qualified by the fact that the plaza was "essentially open to the public." Pet. App. B4. The Board also pointed out that petitioner "shares ownership in the parking lot * * * with the operators of a strip of 13 stores," and that the "parking lot is available for use by patrons and employees of all the stores." *Id.* at B3.

Finally, the Board found that "there was no reasonable, effective alternative means available for the Union to communicate its message to [petitioner's] employees." Pet. App. B4. The Board explained that, in the "large 'suburban-urban'" setting of Greater Hartford, the use of mass media—such as newspapers, radio, and television—was "both expensive and ineffective" as a means of communicating with petitioner's 200 employees. *Id.* at B4-B5. The Board also found that, despite the Union's "diligence and perseverance," the "obstacles to comprehensive tallying of [employees'] names and addresses" from license plate numbers of cars parked in the plaza parking lot were "manifest." *Id.* at B5. The Board further found that the high speed of traffic made the strip of public property abutting the turnpike "an ineffective and unsafe locale for the union activity." *Id.* at B6.

The Board concluded that "the degree of impairment" of the employees' Section 7 right to organize "if [union] agents were denied access to [petitioner's] parking lot to distribute organizational literature outweighs the degree of impairment of [petitioner's] property right if access were granted." It therefore found a violation of Section 8(a)(1). Pet. App. B6-B7.[2]

[2] In findings not at issue here, the Board also concluded that petitioner violated Section 8(a)(1) of the Act by attempting to remove the

3. The court of appeals enforced the Board's order. After reviewing *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and later decisions of this Court discussing the right of access to private property under Section 7, Pet. App. A10-A12, the court concluded that the Board's *Jean Country* approach to the accommodation of conflicting rights in such cases is a "reasonable interpretation of the Act" that "meld[s] harmoniously with binding precedent." Pet. App. A14. The court rejected petitioner's contention that *Jean Country*'s balancing test conflicts with the approach laid down in *Babcock*. Pet. App. A12 & n.5, A14.

The court also rejected petitioner's contention that the Board had incorrectly applied the *Jean Country* principles in this case. Pet. App. A14-A22. After an extensive review of the Board's analysis, the court agreed that core Section 7 rights were at issue; that the exercise of those rights would not interfere with petitioner's business; and that without effective alternative means of communication, the Section 7 right at stake would be "substantially destroyed." Pet. App. A15.

Turning to "the crux of the dispute," the court upheld the Board's conclusion that the Union had no effective alternative means to reach petitioner's employees. Pet. App. A16, A22. In contrast to *Babcock*, where this Court found reasonable alternatives to exist, the court of appeals noted that without access to the parking lot, petitioner's employees could not be reached: "employees are not easily accessible or identifiable," the area involved in this case is "much more populous," and the Union's "good-faith effort to explore alternative routes" tended to reveal that other means of communication were ineffective. Pet. App. A17-A18. The court

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organizers from public property abutting its parking lot, and that petitioner's installation of a video camera to monitor exterior areas adjacent to the store did not violate the Act. Pet. App. B2, B25-B26.

also noted that, without access, there was no way for the Union to speak with employees in person and that use of mass media would be prohibitively expensive. *Id.* at A19. Moreover, the court noted, the property right at issue here is far weaker than that at issue in *Babcock*; that case involved a private and secluded factory not open to the public, while, here, admission to the publicly accessible parking lot would be "minimally intrusive." *Id.* at A17, A19.

One judge dissented, finding this case indistinguishable from *Babcock*. Pet. App. A24-A28. The dissenting judge also took issue with the *Jean Country* test, believing that in assessing the union's alternative means it slights such methods of communication as newspapers, radio, and television, and that it equates the employees' lack of response to the union's message with the absence of adequate means for the union to reach employees. *Id.* at A28-A33.

ARGUMENT

Petitioner contends (Pet. 6-15) that the Board's *Jean Country* decision, as applied in this case to allow union personnel access to petitioner's parking lot to engage in organizational handbilling, conflicts with this Court's decision in *Babcock*. That contention is without merit. Moreover, those few courts of appeals that have addressed the issue have consistently concluded that the *Jean Country* approach represents a reasonable accommodation of employees' Section 7 rights and property rights. Accordingly, this Court's review is not warranted.

1. In *Babcock*, the Court declared that, where the exercise of Section 7 rights conflicts with property rights, the Board must seek to accommodate them "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. "[I]f reasonable efforts by the union through other available channels of communication

will enable it to reach the employees with its message," an employer may enforce nondiscriminatory rules barring nonemployees from distributing union literature on its property. *Ibid.* In contrast,

> when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

Ibid. Applying that test to the facts presented, the *Babcock* Court found that nonemployee organizers were not entitled to access to the industrial plant's parking lot in order to distribute organizational literature to employees. The Court emphasized that the employees lived in a nearby town or its vicinity and could readily be reached through the mails, contacts on the town streets, home visits, and telephone calls. *Id.* at 106-107, 113-114.

In *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the Court reaffirmed the *Babcock* accommodation principle, but indicated that in making the accommodation the Board should take into account the character of all the rights involved. "The locus of that accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Id.* at 522. The Court left "the primary responsibility" for effecting the accommodation to the Board. *Ibid.*

Taking heed of *Babcock* and *Hudgens*, and in light of its experience in applying the Act, the Board reexamined its framework for making a proper accommodation in access-to-property cases in *Jean Country*. In *Fairmont Hotel*, 282 N.L.R.B. 139 (1986), the Board had announced a test under which the claim of Section 7 rights would be balanced against the strength of the property right involved, with the stronger right prevailing. Only if the rights

were deemed relatively equal in strength would the existence of reasonable alternative means of communication "become determinative." 282 N.L.R.B. at 142. In *Jean Country*, the Board concluded that "the availability of reasonable alternative means is a factor that must be considered in every access case." Slip op. 3.

To ensure the proper calibration of competing interests, the Board fashioned a multi-factor balancing test. *Jean Country*, slip op. 9-10. In keeping with *Hudgens*, the Board's test calls for a careful examination of the nature and strength of the Section 7 and property rights at issue. The "essential concern" is to balance "the degree of impairment of the Section 7 right if access should be denied * * * against the degree of impairment of the private property right if access should be granted." Slip op. 9. In that analysis, the "availability of reasonably effective alternative means" is "especially significant." *Ibid.* In considering the adequacy of the alternative means, the Board stated that it will consider, among other factors, "the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message." Slip op. 8-9 (footnote omitted).

As the court of appeals explained, *Jean Country* reasonably implements the principles of *Babcock* and *Hudgens* and the policies of the Act committed to the Board's care. Pet. App. A14. Every court that has considered the issue has reached the same conclusion. *Laborers' Local Union No. 204* v. *NLRB*, 904 F.2d 715, 718 (D.C. Cir. 1990); see *Emery Realty, Inc.* v. *NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988) (criticizing *Fairmont* and approving *Jean Country* in dicta).

2. a. Petitioner contends (Pet. 10-12) that *Jean Country* misapplies the alternative means requirement of *Babcock* by focusing not on whether the union can "reach" the employees through use of nontrespassory alternatives, but on whether the union is successful in using those alternatives. That contention misconstrues both *Babcock* and the Board's approach. *Babcock* requires not only that alternative means of communication be available, but that those "usual means" not be "ineffective" for the purpose of communicating with the employees. 351 U.S. at 112, 113. Nothing in the Court's opinion requires the Board to ignore the possibility that alternative means (such as mass media) might be too expensive or burdensome to constitute a realistic way for the union to disseminate its message.

Likewise, the Board does not base its access determinations on whether the employees are willing to listen to the union's message; rather, the Board's test focuses on whether there is a reasonable means for the union to convey that message at all. If the means of communication without access cannot reasonably transmit the union's message to employees, Section 7 rights may be impermissibly destroyed. The Board's statement in *Jean Country*, slip op. 9, that it would consider "the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message" does not mean, as petitioner suggests (Pet. 10), that the Board looks to the effectiveness of the "message" rather than the effectiveness of the "attempts." The statement merely reflects the truism that union communications that are unlikely to be heard by a large part of the intended audience are necessarily diluted in their effectiveness.[3]

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[3] In *Jean Country*, the Board stated that "generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact." Slip op. 7. The dissenting judge viewed that observation as creating an impermissible presumption against common means of communication in modern society. Pet. App. A27-A28. The court, however, correctly viewed this statement "as no more than a prediction of probable outcomes in an increasingly urbanized society where use of mass media has become more and more expensive." *Id.* at A20 n.13.

The Board's analysis in this case makes evident the error of petitioner's contention that the Board has "made the Union's success the primary indicator of whether the available non-trespassory means of communication were adequate and effective." Pet. 11. The Board focused specifically on the inadequacy of the avenues of available communication available, other than distribution of literature in petitioner's parking lot. The Board noted that, although the Union placed advertisements in the area's general circulation newspaper in an attempt to reach petitioner's employees, that approach was expensive and ineffective because the employees lived in a large "suburban-urban" area, and there was no showing that many of petitioner's employees received, purchased, or read this newspaper.[4] The Board further noted that, although the Union obtained some names and addresses of petitioner's employees from license plate numbers, that method was deficient, even with Union diligence and perseverance, because employees may use cars registered to others, may car-pool, may walk or take the bus to work, or may not park in the designated employee area. Finally, the Board found that the narrow strip of public property abutting the Berlin Turnpike afforded an unsafe and ineffective locale for the Union's handbilling activity. Pet. App. B5-B6. Those findings demonstrate the Board's concern to determine whether effective alternatives exist; they do not evidence an intention to ensure a positive employee response.

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[4] Petitioner's practice of removing the advertisements from the newspapers delivered to the store, Pet. App. B5 n.9, also vitiated the effectiveness of that medium of communication.

Nor did the court of appeals change the focus of the inquiry from the existence of alternative means to the level of enthusiasm of employee response. Contrary to petitioner's contention (Pet. 11), the court canvassed objective factors impeding the Union from communicating with the employees, and concluded that the Board's determination was "sufficiently record-rooted" to justify affirmance. Pet. App. A22.

b. Petitioner also errs in contending that *Babcock* requires the Board, in accommodating employee rights and private property rights, to skew the balance "in favor of private property rights." Pet. 13. *Babcock* directs the Board to accommodate the two rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. Neither right enjoys presumptive primacy over the other. In *Hudgens*, the Court reaffirmed that principle, adding that the "locus" of the accommodation of Section 7 rights and private property rights would likely "fall at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context." 424 U.S. at 522. If petitioner's presumption in favor of protecting property rights were accepted, the careful scheme of accommodation of conflicting rights envisioned by the Court would be upset, and core Section 7 rights protected by the Act would be subordinated to a nearly insurmountable preference for upholding property rights. *Babcock* did not decree such a one-sided regime.[5]

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[5] Nor has the Board tipped the scales unduly in favor of access. Contrary to petitioner's suggestion (Pet. 12-13 & n.3), the Board, since *Jean Country*, has not invariably found that a union is entitled to access to private property. In several cases, the Board has held that the availability of alternative means of communication diminished a union's need to engage in trespassory conduct. See, *e.g.*, *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62 (Aug. 31, 1989); *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48 (May 31, 1989), aff'd *sub nom. Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990).

Nor does *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), conflict with the Board's approach. The issue in that case was whether the Act preempts a state trespass action against a union engaging in area standards picketing; the Court held only that, when the union had not filed an unfair labor practice charge, the state-law action was not preempted. As petitioner notes (Pet. 12-13), the Court did state that an owner's property right to exclude trespassers is a strong right that will "[g]eneral[ly]" outweigh Section 7 rights in the ordinary trespass context. But the Court had no occasion to consider whether any particular alternative means of communication would be effective to protect Section 7 rights. Moreover, the Court expressly acknowledged that when the Section 7 right lies at the "very core" of the Act—such as "organizational solicitation," as is involved here—the argument for protecting the trespassory conduct is more "compelling." See 436 U.S. at 205-206 & n.42.

c. Finally, petitioner contends (Pet. 14-15) that the court of appeals' holding in this case "resurrect[s]" a position that this Court rejected in *Babcock*. But as the court of appeals took pains to explain, the circumstances in *Babcock* differ markedly from those of this case. Pet. App. A17-A22.

Although in both cases nonemployee union organizers sought to distribute handbills in a privately owned parking lot, the nature of the property interests and the availability of alternative means of communication in the two cases cannot be equated. The property involved in *Babcock* was a private parking lot, owned by the employer, adjacent to a factory in a secluded and remote location fenced off from the general public; this case involves an open parking lot

in a shopping plaza where the public is invited, and, indeed, encouraged, to come. The court correctly characterized the magnitude of the property interest in *Babcock* as "significantly stronger." Pet. App. A17. Moreover, alternative means of communicating with employees in *Babcock* were "readily available" to the union because the factory was situated in a rural area near one small community. 351 U.S. at 114. Petitioner's store, in contrast, lies in the heart of a sprawling metropolitan area of 900,000 people, and the employees are scattered throughout. If the Union had unlimited time and money, perhaps it could saturate the region's mass media with organizational material and "reach" petitioner's 200 employees; but if that were the test for finding that "reasonable efforts * * * through other available channels" constituted a sufficient alternative, *Babcock*, 351 U.S. at 112, Section 7 rights would have little practical value in a case like this one.

At bottom, petitioner's insistence (Pet. 14-15) that the Board has undervalued the means of communication commonly employed by "politicians and advertisers" reduces to a disagreement over the Board's appraisal of the efficacy of those methods when applied by a Union to reach a targeted group of employees. It is the Board, however, that is entrusted with the responsibility to give particularized content to the Act's policies. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1552 n.9 (1990); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board's decision in this case drew on its knowledge and experience in concluding that the Union lacked adequate alternatives to reach petitioner's employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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